

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES DONNELLY and	:	
IRENE M. DONNELLY,	:	
Administrators of the Estate	:	CIVIL ACTION
of JOSEPH W. DONNELLY	:	
	:	
vs.	:	
	:	
KILLINGTON, LTD.	:	NO. 96-6933

ORDER AND MEMORANDUM

AND NOW, to wit, this 10th day of July, 1997, upon consideration of the Motion of defendant, Killington, Ltd., to Dismiss for Lack of Personal Jurisdiction, or in the Alternative, Motion to Transfer Venue to the U.S. District Court for the District of Vermont (Document No. 2, filed Jan. 27, 1997), the Answer of plaintiffs, Charles Donnelly and Irene M. Donnelly, to Motion of Defendant to Dismiss for Lack of Personal Jurisdiction, or in the Alternative, Motion to Transfer Venue to the U.S. District Court for the District of Vermont (Document No. 3, filed Feb. 18, 1997), the April 21, 1997 expert report of Francene W. Black, M.D. (submitted by plaintiffs and received April 23, 1997), and the June 9, 1997 expert report of Timothy J. Michals, M.D. (submitted by defendant and received June 23, 1997),¹ **IT IS ORDERED** that the Motion of defendant, Killington, Ltd. to Dismiss is **DENIED**

¹ Due to the personal nature of the expert reports they will not be docketed. However, the reports were used in determining whether to transfer this case and may be used in any related proceedings.

and the alternative Motion to Transfer Venue to the U.S. District Court for the District Court fo the District of Vermont is **GRANTED**. The Clerk of the United States District Court for the Eastern District of Pennsylvania is directed to send the complete file to the United States District Court for Vermont.

The decision of the Court is based on the following:

1. This case arises out of a downhill skiing accident that resulted in the death of plaintiffs' son, Joseph W. Donnelly. The accident took place at a ski area owned by defendant, Killington Ltd. Plaintiffs allege that their son's death was caused by defendant's negligence and carelessness. Damages are sought in excess of \$100,000. Killington, Ltd. is a resident of Vermont and plaintiffs are residents of New Jersey. This Court has subject matter jurisdiction based upon the diverse citizenship of the parties. 28 U.S.C. § 1332.

2. Defendant argues that plaintiffs' lawsuit should be dismissed because this Court does not have personal jurisdiction over defendant. Plaintiffs contend that the Court has personal jurisdiction over defendant because defendant has carried on continuous and systematic parts of its business in the Eastern District of Pennsylvania.

3. The Court need not determine whether it has personal jurisdiction over defendant because a court without personal jurisdiction may transfer an action elsewhere, and this Court shall do so. Seidman v. Killington Limited, Civ. A. No. 90-0161, 1990 WL 26680, *1 (E.D. Pa. Mar. 12, 1990) (citing United States v.

Berkowitz, 328 F.2d 358, 361 (3d Cir. 1964)).

4. In the alternative, defendant has moved to transfer the case to the District of Vermont pursuant to 28 U.S.C. § 1404(a) which reads as follows:

For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

5. The analysis required in deciding a motion under 28 U.S.C. § 1404(a) is flexible and should include the following factors:

- a. plaintiff's choice of forum;
- b. relative ease of access to sources of proof;
- c. availability of compulsory process for attendance of unwilling witnesses and cost of obtaining attendance of willing witnesses;
- d. possibility of viewing premises, if applicable;
- e. all other practical problems that make trial a case easy, expeditious and inexpensive; and,
- f. "public interest" factors, including the relative congestion of court dockets, choice of law considerations, and the relationship of the community in which the courts and jurors are required to serve to the occurrences that give rise to the litigation.

Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 508 (1946).

6. Plaintiffs choice of forum is normally given deference, Shutte v. Armco Steel Corporation, 431 F.2d 22 (3d Cir. 1970), cert. denied 401 U.S. 910 (1971), but plaintiffs choice is entitled to less weight where, as here, plaintiffs are not residents of the forum state, New Image, Inc. v. Traveler's Indem.

Company, 536 F.Supp. 58, 59 (E.D. Pa. 1981); Jordon v. Delaware & Hudson Ry. Company, 590 F.Supp. 997, 998 (E.D. Pa. 1984), and where none of the operative facts underlying plaintiffs' cause of action occurred in plaintiffs' chosen forum. National Mortgage Network v. Home Equity Centers, 683 F.Supp. 116, 119 (E.D. Pa. 1988); Cain v. DeDonatis, 683 F.Supp. 510, 512 (E.D. Pa. 1988); Schmidt v. Leader Dogs for the Blind, Inc., 544 F.Supp. 42, 47 (E.D. Pa. 1982).²

7. There are few documents involved in this case, and the parties have not explained in their briefs where those documents are stored. Thus, it is not clear to the Court whether it is relatively easy to access sources of proof in this district or the District of Vermont, and this factor must be considered neutral in the Court's § 1404(a) analysis.

8. The accident that led to the death of plaintiffs' son took place in Vermont. Thus, it will be much easier to view the premises if the case is tried in Vermont rather than in the Eastern District of Philadelphia.

9. Plaintiffs contend that, as a practical matter, this case cannot be tried in Vermont because of the psychological effect

² Defendant argues that plaintiffs' choice of forum should be disregarded entirely based on a forum selection clause on the back of the lift ticket purchased by plaintiffs' decedent. The Court was provided a sample of the standard lift ticket in use at the time of the accident and concludes that the lift ticket is almost illegible and is not "reasonably communicative" to a purchaser. Thus, the forum selection clause should not be enforced under the "standard of reasonable communicativeness" adopted by the Third Circuit in Marek v. Marpan Two, Inc., 817 F.2d 242, 245, and the Court will not rely on the forum selection clause in determining whether to transfer this action.

such a forum would have on Irene Donnelly. An April 21, 1997 expert report of Francene W. Black, M.D., a staff psychiatrist at Rainbow Healthcare Associates, was submitted in support of plaintiffs' position. Defendant submitted a June 9, 1997 report from its expert, Timothy J. Michals, M.D., a psychiatrist, based upon Dr. Michals' evaluation of Irene Donnelly on June 5, 1997.

Both experts agree that Ms. Donnelly is suffering from depression and Post Traumatic Stress Syndrome. Dr. Black states that it is her opinion that Irene Donnelly will not be an effective witness in her own behalf because of the high emotional state in which she would be if this case is tried in Vermont. Dr. Michals is of the opinion that there is no impairment in Irene Donnelly's mental status that would prevent her from testifying in this litigation in Vermont and that she will experience significant emotional distress at the time of the trial regardless of where the case is tried.

The Court concludes that Irene Donnelly will most likely experience significant emotional distress regardless of where this case is tried. Although there may be an incremental increase in that distress if the case is tried in Vermont rather than Pennsylvania, that increase is insufficient to outweigh the numerous other factors favoring transfer of this case to the District of Vermont.

10. Defendant has represented to the Court that at least twelve (12) witnesses are necessary to its defense and that ten (10) of those witnesses are residents of Vermont. One (1) of the

witnesses is a resident of either Vermont or New Hampshire, one (1) of Connecticut. Finally, the defense expects to call an unspecified number of doctors from Rutland Regional Medical Center, presumed to be Vermont residents. Plaintiffs contend that the doctors are not relevant because plaintiffs' decedent died before he reached Rutland Regional Medical Center.

Plaintiffs have represented to the Court that twenty-seven (27) witnesses are likely to testify on their behalf. Twenty of those witnesses are residents of New Jersey, six (6) of Pennsylvania, and one (1) of Texas. Of those twenty-seven (27), only one (1) of the witnesses allegedly witnessed part of the accident, and only three (3), including the alleged eyewitness, were with defendant in Vermont at the time of the accident. The other twenty-four (24) witnesses will all testify as to damages.

The majority of the liability witnesses reside within the area in which a judge in the District of Vermont may compel their appearance at trial.³ Although the majority of the damages witnesses reside within the area in which this Court may compel their appearance, that fact is not as weighty as this Court's inability to compel the appearance of the liability witnesses and the ability of the United States District Court for the District of Vermont to do so. Thus, this factor favors transfer.⁴

³ Federal district courts have limited subpoena power which extends only for a one-hundred (100) mile radius.

⁴ The parties have not briefed the issue of the cost of obtaining attendance of willing witnesses who are outside of either this district's or the Eastern District's power of

11. One public interest factor relevant to a motion for change of venue under § 1404(a) is the "local interest in having localized controversies decided at home." Gulf Oil, 330 U.S. at 508-509. This factor favors a transfer to the District of Vermont, where the accident took place.

12. Another public interest factor favoring transfer is that Vermont law will most likely be applied in this case.

13. No public interest factor favors this Court denying defendant's alternative Motion to Transfer.

14. The action could originally have been filed in the United States District Court for the District of Vermont, as evidenced by plaintiffs' having filed an identical "protective" action in that court. See Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (stating that a case may only be transferred to a federal district in which the action "might have been brought").

15. The District of Vermont is an appropriate forum for this action.

16. The District of Vermont is a more convenient forum than the Eastern District of Pennsylvania for moving defendant and most of the liability witnesses in this case.

17. A transfer to the District of Vermont would best serve the interests of justice.

BY THE COURT:

compulsory process.

JAN E. DUBOIS, J.